

# CRIMINAL YEAR SEMINAR

April 14, 2017 - Tucson, Arizona  
April 21, 2017 - Phoenix, Arizona  
May 12, 2017 - Chandler, Arizona



## 2016 CONSTITUTIONAL LAW UPDATE

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**OCTOBER TERM 2016-17  
SUPREME COURT OF THE  
UNITED STATES**



**LAW OFFICES OF  
Robert J. McWhirter**

# About the Court?



# The Court without Justice Scalia

- During the 2015-2016 term the Court deadlocked only 4 times (4-4) in 81 decisions.





NO  
VACANCY



- Gorsuch confirmed 54-45 vote April 7, 2017.
- Supreme Court will hold its final, two-week argument sitting of this term beginning on April 17, 2017.
- Gorsuch was expected to join the court for those arguments.



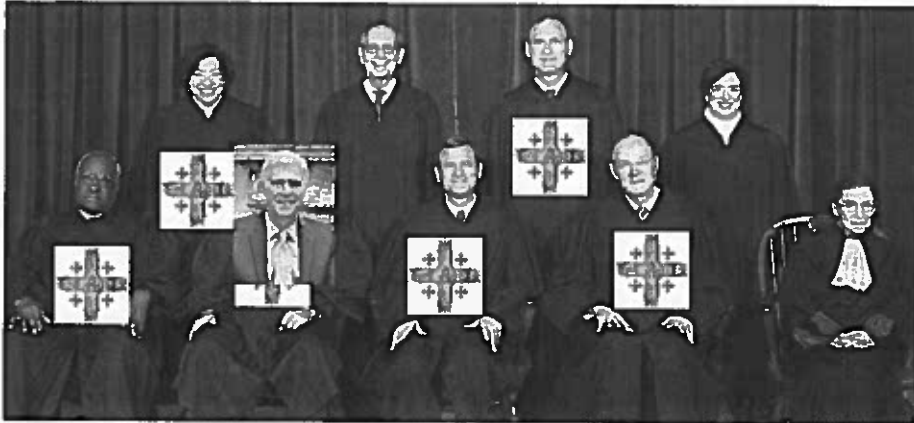
## Catholics on the Supreme Court



- **Diversity but no Protestants**
- **6 Catholics**

- ❖ For its first 180 years, justices were almost always white male Protestants
- ❖ Of the 112 justices who have been appointed to the court, 91 have been from various Protestant denominations, 12 have been Catholics
- ❖ Roger Taney = first Catholic Justice and Chief Justice



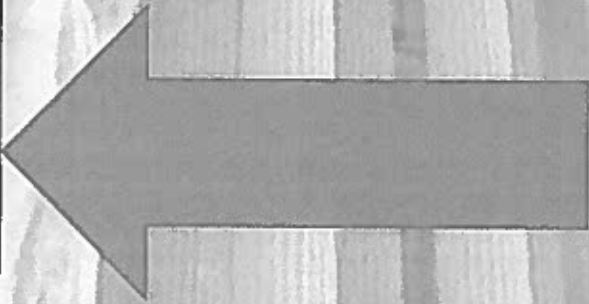


# Catholics on the Supreme Court



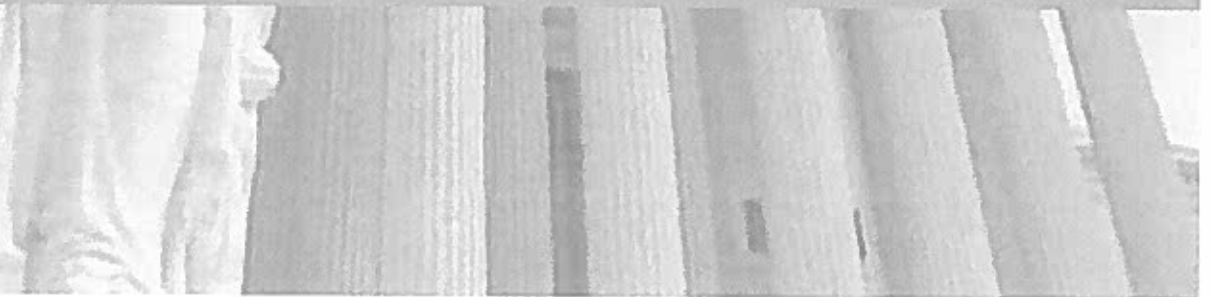
Raised Catholic  
Jesuit Educated  
Wife = English  
Attends  
Episcopalian  
Church

?





- Gorsuch decried the thousands of federal criminal statutes.
- “And the spigot keeps pouring, with hundreds of new statutory crimes inked every few years.... There are so many crimes ... in the numbing fine print of those pages that scholars actually debate their number.”
- “Overcriminalization” = buzzword of corporate legal defense teams that prosecutors turn routine business behavior into crimes.





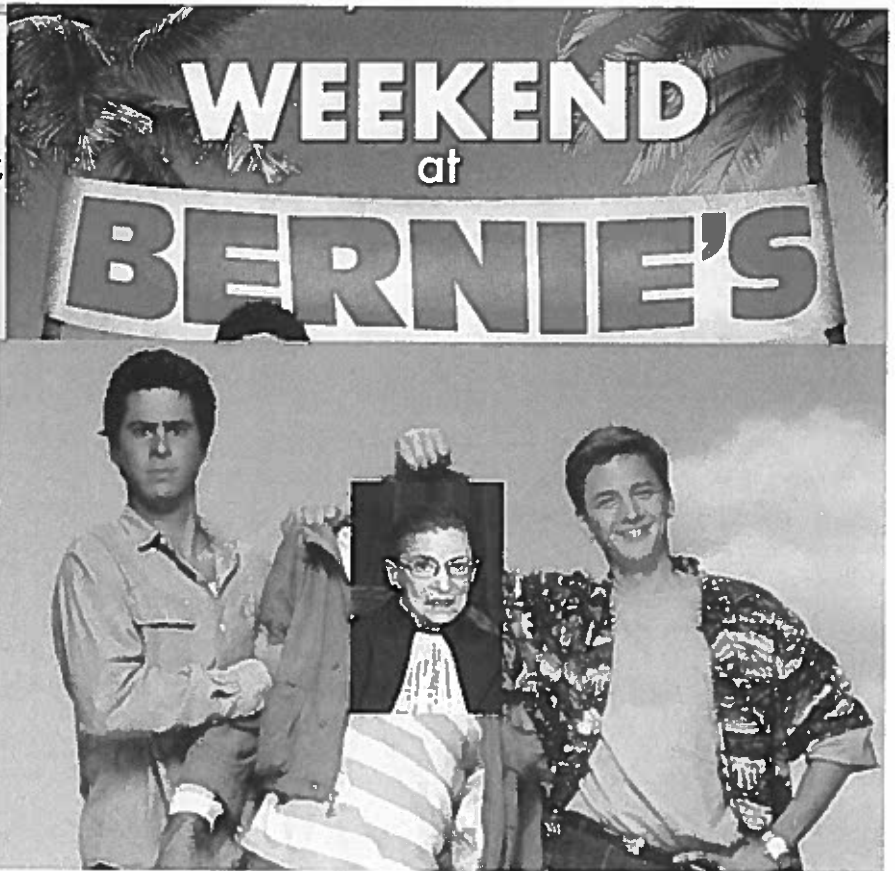


- **Freedom of Religion** = *Trinity Lutheran Church of Columbia v. Pauley*
- Church's application for a grant from Missouri to use recycled tires to resurface a playground
- Missouri's state constitution = "no money shall be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion."
- No new playground for Trinity.
- Women's groups = If the court allows the church to receive public funds despite Missouri's constitution, it opens the door to public funds going without any safeguards to groups that might discriminate on the basis of sex, sexual orientation, and religion.

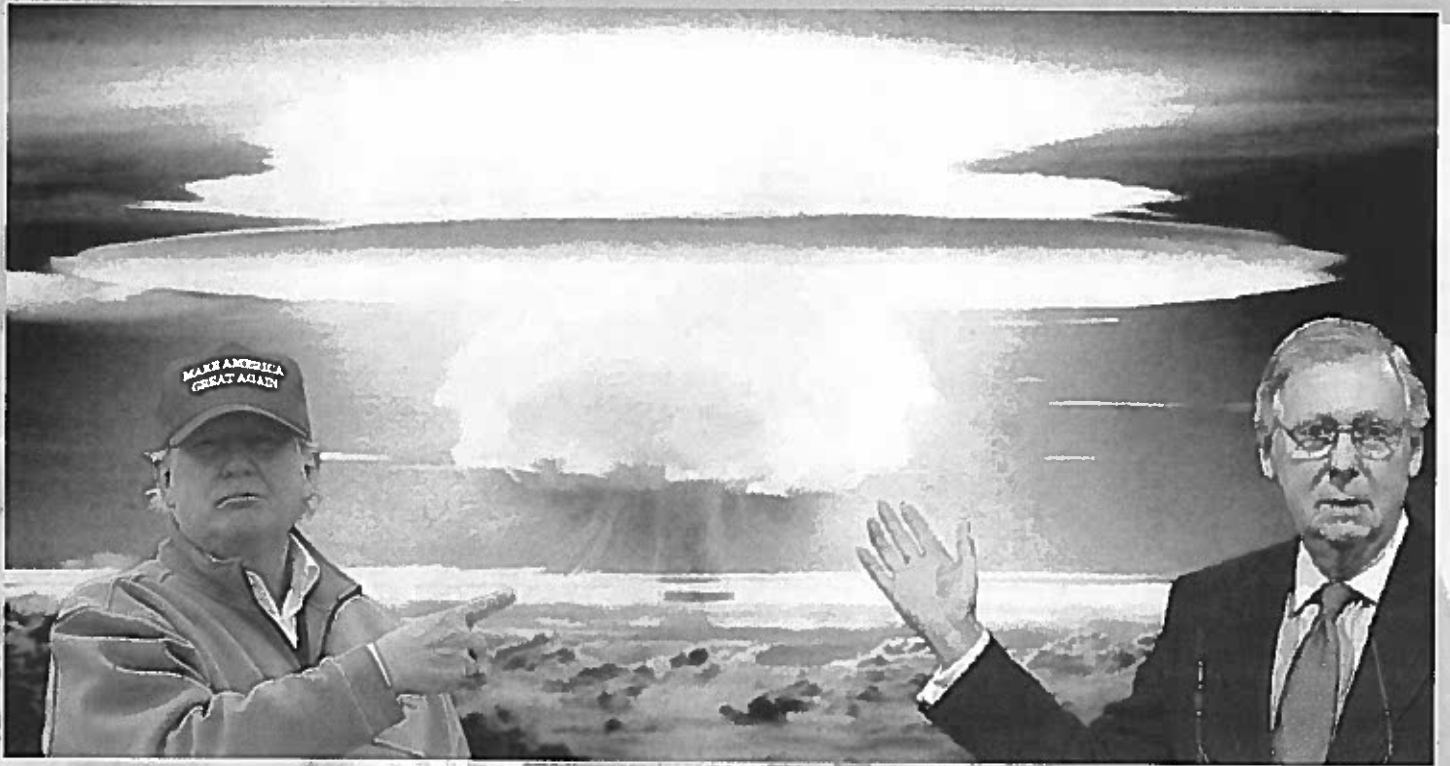




- ❖ Justice Ginsburg just turned 84
- ❖ Decided not to retire in 2014
- ❖ Senate now is Republican controlled



## Senate Republicans went Nuclear



## The Filibuster



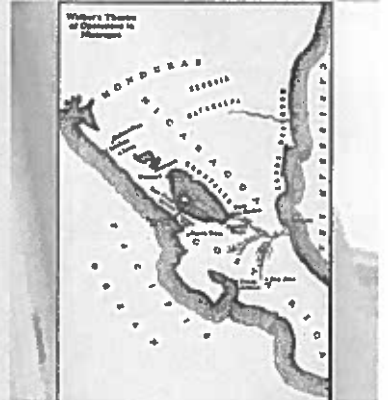
- **Filibuster** = a Senate dilatory or obstructive tactic to prevent a measure from being brought to a vote.
- Not in Constitution *per se*
- 3/4<sup>th</sup> of Senators (usually 60 out of 100) can invoke cloture. Senate Rule XXII.
- On April 6, 2017, the Republican controlled Senate voted 52 to 48 to require only a majority vote to end a filibuster of Supreme Court nominees.





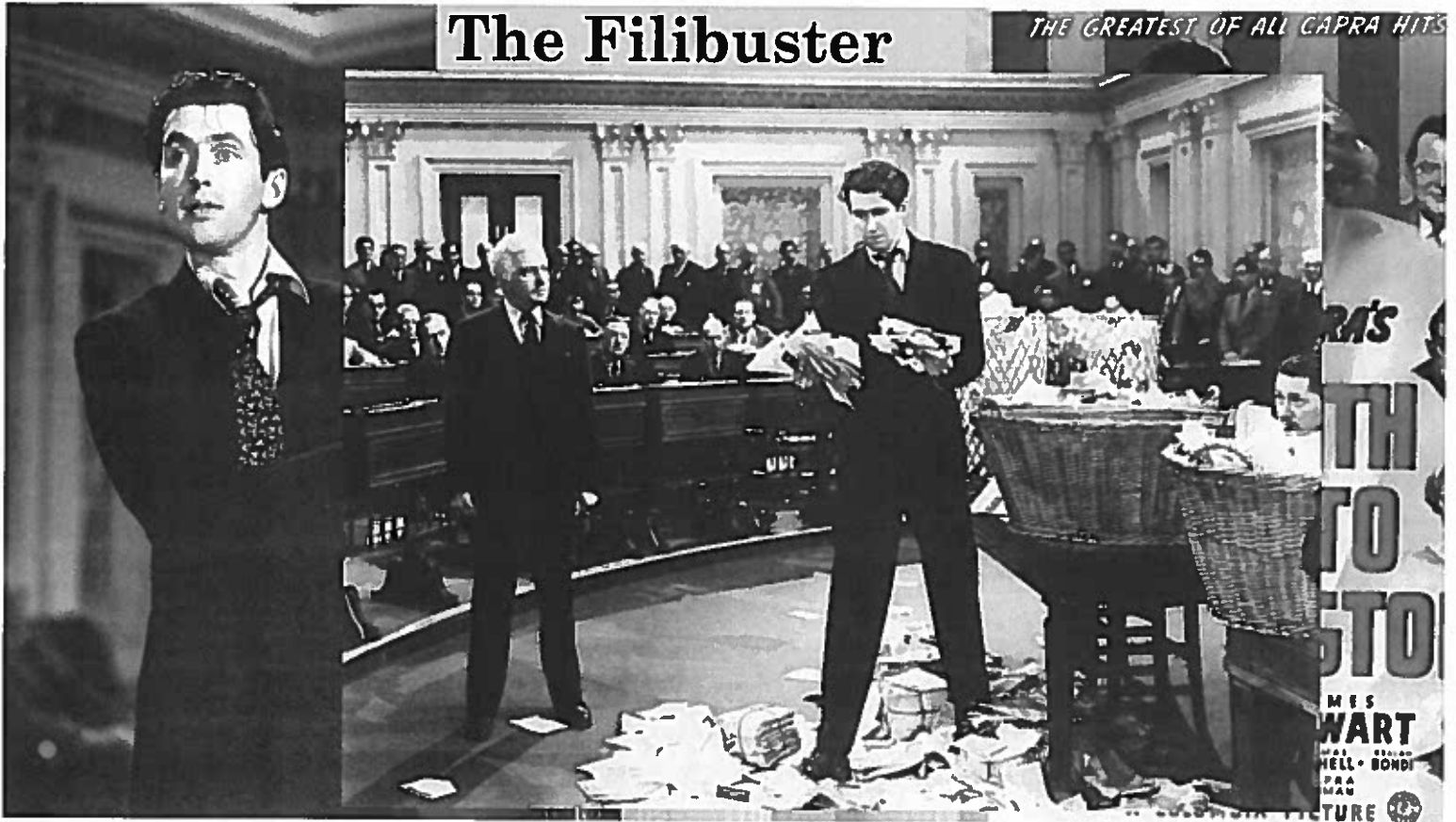
- **Roman Republican Cato the Younger used the Filibuster in the Roman Senate**
- **Etymology** = "filibuster" derives from the Dutch *vrijbouter* ("freebooter", a pillaging and plundering adventurer)
- The *Oxford English Dictionary* finds its only known use in early modern English in a 1587 book describing "flibutors" who robbed supply convoys.
- In the late 18th century, the term was re-borrowed into English from its French form *flibustier*.

- The modern "filibuster" was borrowed in the early 1850s from the Spanish *filibuster*
- Applied to private military adventurers like **William Walker** who were then attacking and pillaging Spanish colonies in Central America.
- Walker was born Nashville Tennessee
- President of the Republic of Nicaragua July 12, 1856 to May 1, 1857
- Hondurans executed him by firing squad September 12, 1860



# The Filibuster

THE GREATEST OF ALL CAPRA HITS







## O, the Brave New World of the 4th Amendment

### The 4th Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

## FOURTH

### The Fourth Amendment

"THE RIGHT OF THE PEOPLE TO BE SECURE IN THEIR PERSONS, HOUSES, PAPERS, AND EFFECTS, AGAINST UNREASONABLE SEARCHES AND SEIZURES, SHALL NOT BE VIOLATED, AND NO WARRANTS SHALL ISSUE, BUT UPON PROBABLE CAUSE, SUPPORTED BY OATH OR AFFIRMATION, AND PARTICULARLY DESCRIBING THE PLACE TO BE SEARCHED AND THE PERSONS OR THINGS TO BE SEIZED."

# 4

When Great Britain ruled the Colonies, officials could search anyone over whom they had power. The FOURTH AMENDMENT forbids this. It says officials need special permission to search people or their belongings. This special permission is called a "search warrant." To get a search warrant, police must show they have good reason to believe a law has been broken. And the warrant must describe the place and people to be searched and any belongings to be seized.

## AMENDMENT

FORBIDDING UNREASONABLE SEARCHES AND SEIZURES



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- ❖ **Fourth Amendment History**  
Equitable Actions for Trespass
- ❖ Civil aspect as well as criminal.
- ❖ Different than the 5<sup>th</sup>, 6<sup>th</sup>, and 8<sup>th</sup> Amendments
- ❖ **Wilkes and Co. sued all crown officials for trespass**
- ❖ *Wilkes v. Wood*,  
98 Eng. Rep. 489 (C.P. 1763), 19 Howell's State Trials 1153.
- Entick v. Carrington*,  
19 Howell's State Trials 1029 (1765)

**LAST YEAR**  
**CITY OF LOS ANGELES, CALIFORNIA v.**  
**PATEL ET AL.**

No. 13–1175. Argued March 3, 2015—Decided June 22, 2015

**The “No Tell – Hotel” Case**



OCTOBER TERM, 2016  
SUPREME COURT OF THE UNITED STATES

**Manuel v. City of Joliet**

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT  
No. 14-9496 – Decided March 21, 2017

➤ **Subject:** 42 U.S.C. §1983 actions and the 4th Amendment

- **Facts:** Police arrested Manuel during a traffic stop after finding a vitamin bottle with pills.
- Field test was negative for controlled substances.
- At the police station, an evidence tech got the same negative result but wrote “positive for the probable presence of ecstasy.”



**Manuel v. City of Joliet**  
No. 14-9496 – Decided March 21, 2017

- Laboratory testing later confirmed the pills had no controlled substances.
- Manuel spent 48 days in pretrial detention and more than a month after the final test.



- **Justice Kagan - 6-2 majority**
- Petitioners may challenge pretrial detention (in addition to arrest) on the ground that it violated the Fourth Amendment.

- **Alito + Thomas Dissent** = opinion has potential to "dramatically expand Fourth Amendment liability under 1983 in a way that does violence to the text of the Fourth Amendment."



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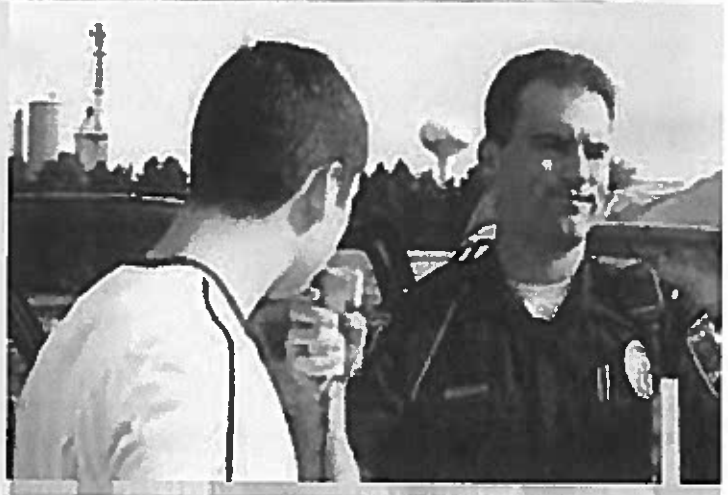
OCTOBER TERM, 2016  
SUPREME COURT OF THE UNITED STATES

**Birchfield v. North Dakota**

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT  
No. 14-1468 - Decided June 23, 2016

**Blood Draws and Implied Consent Laws**

- **Summary:** Convictions for driving under the influence.
- Implied consent laws for breath and blood tests criminalizing refusal to submit.





## **Birchfield v. North Dakota**

No.14-1468 - Decided June 23, 2016

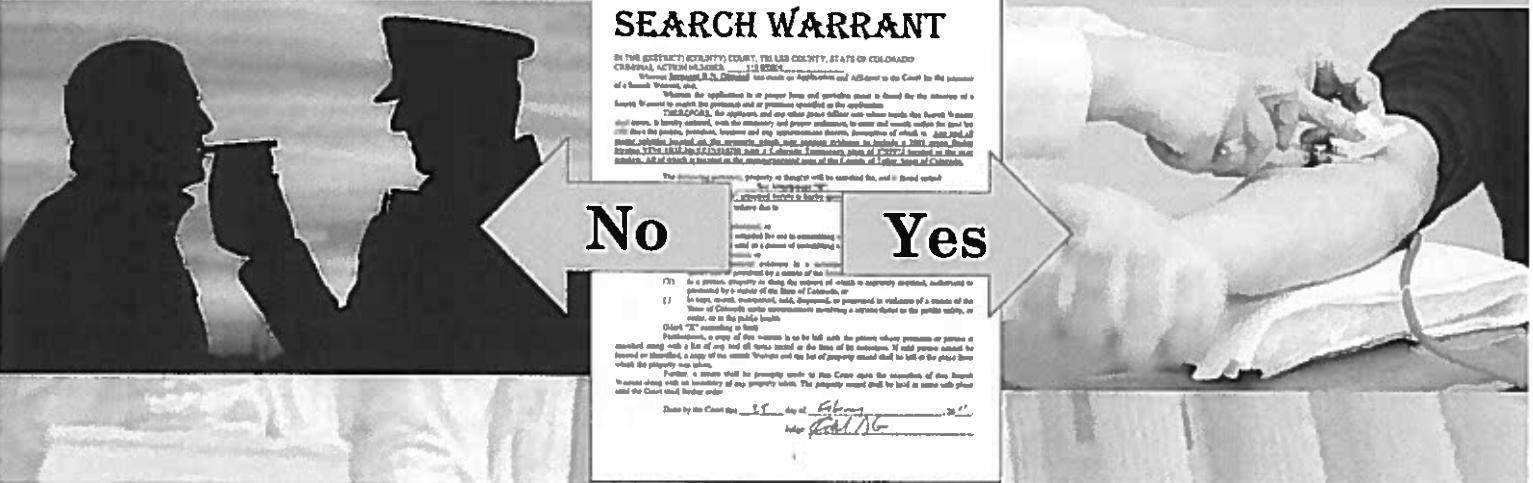
➤ **Held:** A warrantless breadth test of a motorist lawfully arrested for drunk driving is permissible as a search incident to arrest.



➤ A warrantless blood draw is not.

➤ “Because breath tests are significantly less intrusive than blood tests and in most cases amply serve law enforcement interests, we conclude that a breath test, but not a blood test, may be administered as a search incident to a lawful arrest for drunk driving. As in all cases involving reasonable searches incident to arrest, a warrant is not needed in this situation.”

**Holding:** The Fourth Amendment permits warrantless breath tests incident to arrests for drunk driving but not warrantless blood tests.





## ***Birchfield v. North Dakota***

No. - Decided June 23, 2016

➤ Regarding implied consent,  
“motorists cannot be deemed to have  
consented to submit to a blood test on  
pain of committing a criminal  
offense.”



**Justice Alito with Roberts, Kennedy, Breyer and Kagan**

**Justices Sotomayor and Ginsburg would  
hold both kinds of test unconstitutional**



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**Justice Thomas would hold both constitutional.**

OCTOBER TERM, 2016  
SUPREME COURT OF THE UNITED STATES

**Utah v. Strieff**

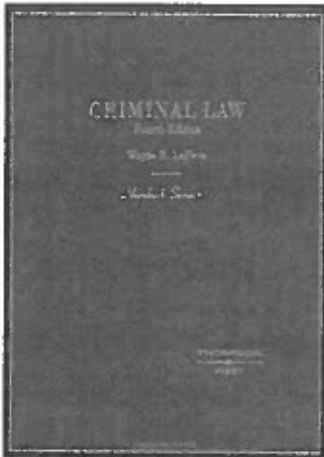
CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT  
No.        - Decided

**Unlawful investigatory stop and search and the attenuation doctrine**

➤ **Summary:** The state trial court denied a motion to suppress because the evidence was admissible based on the attenuation factors from *Brown v. Illinois*, 422 U.S. 590 and that no flagrant police misconduct existed in this case.

➤ **Attenuation** = when an officer makes an unconstitutional stop, learns the suspect is subject to a valid arrest warrant and arrests the suspect and seize incriminating evidence.





- **The snooty definition –**
- Attenuation = “evidence is admissible when the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance, so that ‘the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained.’”

### **Attenuation’s Three-part analysis.**

- 1- What was the time between the unconstitutional conduct and the discovery of evidence?
- 2- Where intervening circumstances are present?
- 3- What was the purpose and flagrancy of the official misconduct?

## Utah v. Strieff

- Officer stopped the defendant without reasonable suspicion - anonymous tip of “narcotics activity” at a particular residence.
- Police dispatcher reported defendant had an outstanding arrest warrant for a traffic violation.
- Search incident to arrest revealed methamphetamine and drug paraphernalia, the defendant was charged.
- The defendant unsuccessfully moved to suppress, arguing that the evidence was inadmissible because it was derived from an unlawful investigatory stop.



### ➤5-3 Opinion by Justice Thomas

- Dissent = Justice Sotomayor with Justice Ginsburg joined as to parts I, II, and III.
- Dissent = Justice Kagan filed a dissenting opinion in which Justice Ginsburg joined. The opinion was issued on June 20, 2016.)

➤Although the case involved an unlawful initial stop and search, the existing warrant was valid, ***predating the investigation and stop***, provided authorization for the search and constituted ***an intervening circumstance***.

➤Also, no flagrancy in the constitutional violation.



## The 5th Amendment



**FIFTH**

**5**

**AMENDMENT**

**CERTAIN RIGHTS OF PERSONS  
ACCUSED OF CRIMES AND  
PERSONS WHOSE  
PROPERTY IS TO BE TAKEN.**

### The Fifth Amendment

TWO PERSONS SHALL BE HELD TO ANSWER FOR A CAPITAL OR OTHER HEAVY CRIME, UNLESS ON A PRESENTMENT OR SUBPOENA OF A GRAND JURY, EXCEPT IN CASES ARISING IN THE LAND OR MARINE FORCES, OR IN THE MILITIA, WHEN IN ACTUAL SERVICE OF THE TIME OF WAR OR PUBLIC EMERGENCY. SHALL ANY PERSON BE SUBJECT FOR THE SAME OFFENSE TO BE TRIED TWICE IN SUCCESION OR PUT ON TRIAL? NO PERSON SHALL BE COMPELLED IN ANY CRIMINAL CASE TO BE A WITNESS AGAINST HIMSELF. NO PERSON SHALL BE DEPRIVED OF LIFE, LIBERTY OR PROPERTY, WITHOUT DUE PROCESS OF LAW. NO PERSON SHALL BE TAKEN FOR QUARTERS, WITHOUT DUE COMPENSATION.

The first part of this amendment says a person can only be put on trial for a capital crime after a grand jury has agreed that this should happen. A grand jury is a group of citizens who decide whether there is enough evidence at the scene to try a case. The fifth amendment also says a person cannot be tried more than once for the same crime. And to keep persons protected if people know the government is making any statement that might be used against them in a trial, they can refuse to answer questions until they have the right to make sure the fifth amendment says a person accused of a crime has the right to have a lawyer to help them. If they cannot afford a lawyer, one will be appointed for them before any trial if they are accused of a crime.



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# Puerto Rico and Double Jeopardy



OCTOBER TERM, 2016  
SUPREME COURT OF THE UNITED STATES  
**Bravo-Fernandez v. United State,**  
CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT  
No. 15-537 - Decided



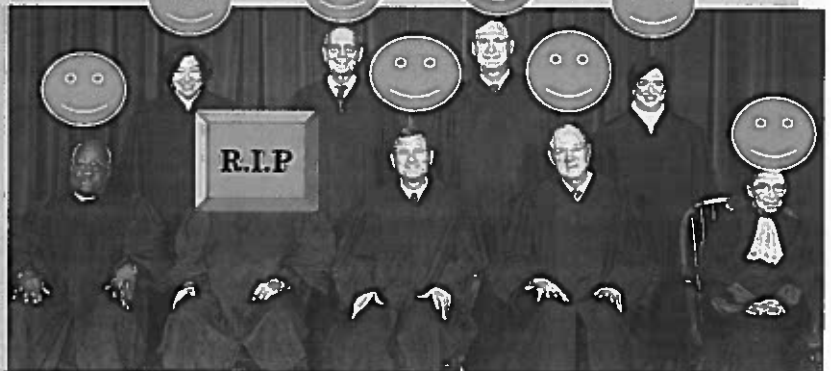
- **Facts:** Jury convicted Juan Bravo-Fernandez (Bravo) and Hector Martínez-Maldonado (Martínez) of bribery under 18 U. S. C. §666 but acquitted them of conspiring to violate §666 and traveling in interstate commerce to violate §666.
- The verdicts were irreconcilably inconsistent.
- The Fifth Circuit overturned convictions for the judge's error unrelated to the verdicts' inconsistency.

**Issue:** Does the Double Jeopardy Clause bar retrial?

OCTOBER TERM, 2016  
SUPREME COURT OF THE UNITED STATES  
**Bravo-Fernandez v. United State,**  
CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT  
No. 15-537 - Decided



➤ **Holding:** The Double Jeopardy Clause does not bar the government from retrying defendants after a "jury has returned irreconcilably inconsistent verdicts of conviction and acquittal and the convictions are later vacated for legal error unrelated to the inconsistency."



OCTOBER TERM, 2016  
SUPREME COURT OF THE UNITED STATES

**Commonwealth of Puerto Rico v. Sanchez Valle**

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT  
No. 15-537 - Decided June 9, 2016

- **Facts:** Puerto Rico indicted the defendant for illegally selling guns.
- While the Puerto Rico case was pending federal grand juries in the United States also indicted him based on the same transactions under similar gun trafficking laws.
- Does Jeopardy Apply?
- The majority found that because the United States federal government and Puerto Rico have the same “ultimate source” of power (as opposed to individual states), they are not separate sovereigns. Even though Puerto Rico has its own constitution and the ability to promulgate criminal laws and procedures, the original authority for its constitution came from an act of Congress.



OCTOBER TERM, 2016  
SUPREME COURT OF THE UNITED STATES

# **Commonwealth of Puerto Rico v. Sanchez Valle**

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 15-537 - Decided June 9, 2016



➤6-2 Opinion by Justice Kagan



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➤Justice Ginsberg + Justice Thomas Concurrence

➤Justice Thomas Concurring in part and concurring in judgment



➤Justice Breyer + Justice Sotomayor dissent



## Commonwealth of Puerto Rico v. Sanchez Valle



➤ **Held:** The Double Jeopardy Clause bars the governments of Puerto Rico and the United States from prosecuting the same person for the same crime.

➤ Puerto Rico and Feds have the same “ultimate source” of power they are not “separate sovereigns.”

➤ Even though Puerto Rico has its own constitution and the ability to promulgate criminal laws and procedures, the original authority for its constitution came from an act of Congress.



➤ Puerto Rico is not a state

❖ **Jeopardy = Chess**

- ❖ A position in chess where chances are even - the player is on edge  
“ready to be bold, careful not to be rash.”
- ❖ French = *jeu parti* = even game
- ❖ Law French from Norman French into Common Law
- ❖ Chaucer = “jupartie”



**Knights Templar playing chess**

McWhorter - Prosecutorial Misconduct - December 2015

**JEOPARDY!**